STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS

RUBEN CASTRO and CHRISTY CASTRO, jointly and severally, Plaintiffs-Appellees, v. JAMES ALAN GOULET, M.D., and JAMES ALAN GOULET, M.D. P.C., jointly and severally, Defendants-Appellants.	Supreme Court Case No. 152383 Court of Appeals Case No. 316639 Washtenaw County Circuit Court Case No. 13-138-NH Honorable David S. Swartz

---

SUPPLEMENTAL BRIEF IN SUPPORT OF DEFENDANTS-APPELLANTS JAMES ALAN GOULET, M.D. AND JAMES ALAN GOULET, M.D., P.C.'S APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

KERR, RUSSELL AND WEBER, PLC
Joanne Geha Swanson (P33594)
Attorneys for Defendants-Appellants
James Alan Goulet, M.D., and James Alan Goulet, M.D., P.C.
500 Woodward Avenue, Suite 2500
Detroit, MI 48226-3427
313-961-0200
313-961-0388 – facsimile

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Rules

STATEMENT OF QUESTION PRESENTED

The question presented by this Court's June 10, 2016 order is whether the filing of a motion for an extension of time to file an affidavit of merit, which is subsequently granted, is sufficient to toll the statute of limitations.

The Trial Court said "no."

The Court of Appeals majority said "yes."

Plaintiffs-Appellees say "yes."

Defendants-Appellants say "no."

STATEMENT OF FACTS

The relevant facts are set forth in Defendants-Appellants' Application for Leave to Appeal. On June 10, 2016, this Court entered an order directing the clerk to schedule oral argument on whether to grant the application or take other action, and directing the parties to file supplemental briefs addressing "whether the filing of a motion for an extension of time to file an affidavit of merit, which is subsequently granted, is sufficient to toll the statute of limitations." This supplemental brief is submitted pursuant to that order.

INTRODUCTION

While the issue before this Court raises a question of statutory interpretation, it arises in the context of well-settled law governing the failure to file an affidavit of merit with the complaint in an action for medical malpractice. Over the course of sixteen years, the appellate courts of this State have consistently held in a variety of factual contexts that a complaint filed without the requisite affidavit of merit is a "nullity," does not commence the action, and does not toll the statute of limitations. See e.g., *Scarsella v Pollak*, 461 Mich 547, 549-50; 607 NW2d

711 (2000). This interpretation is necessary, this Court has said, to effectuate "the Legislature's clear statement that an affidavit of merit 'shall' be filed with the complaint." *Id*. at 552. If the failure to file an affidavit of merit occurs before the statute of limitations has expired, the complaint will be dismissed *without* prejudice. *Id*. at 551. Dismissal *with prejudice* is required if *the statute of limitations expires* before a proper affidavit of merit is filed. *Id*. at 549. [1]

A motion under MCL 600.2912d(2) to extend by 28 days the time for filing an affidavit of merit does not expressly or impliedly alter the principles of *Scarsella* and its progeny. There are no words in the statute which purport to toll or extend the statute of limitations when a motion to extend is filed, or to retroactively do so when an order granting the motion is entered. The unmistakable language the Legislature has used in enacting other tolling statutes does not appear in MCL 600.2912d(2), and this Michigan statute sharply contrasts with the parallel statutes of other states, which expressly extend the statute of limitations – either automatically or by motion – when additional time is needed to file the required "certifications."

Under *Scarsella*, when the statute of limitations expires before a proper affidavit of merit is filed, the claim is barred. Nothing in MCL 600.2912d(2) expresses a legislative intent to bring a previously-barred claim back from the dead. To benefit from the statute, a medical malpractice

[1] The affidavit of merit requirement is imposed by MCL 600.2912d(1), which was enacted in 1986 and amended in 1993 as part of Michigan's tort reform legislation. It provides that a complaint for medical malpractice shall be accompanied by an affidavit of merit signed by a health professional who satisfies the requirements for an expert witness under MCL 600.2169. The affidavit must certify that the health professional has reviewed the allegations of malpractice and the medical records, and must further describe the applicable standard of care, the health professional's opinion that the standard of care was breached, the actions that should have been taken or omitted to comply with the standard of care, and the manner in which the breach proximately caused injury. The purpose of the requirement is to deter frivolous claims and to ensure that medical malpractice actions will be supported by credible medical testimony. See e.g., *Scarsella v Pollak*, 461 Mich at 551; *Barnett v Hidalgo*, 478 Mich 151, 163-164; 732 NW2d 472 (2007).

plaintiff must obtain an extension order ***before*** the statute of limitations expires. A contrary ruling will create an untenable, illogical and irreconcilable schism in the various aspects of Michigan law that are implicated by this issue, e.g., the rules of statutory construction, the rules governing affidavits of merit, and the statute of limitations doctrines.

ARGUMENT

I. The Granting Of A Motion To Extend Pursuant To MCL 600.2912d(2) Does Not Retroactively Toll The Statute Of Limitations From The Time Of Filing The Motion Or Revive A Claim That Was Barred By The Statute Of Limitations Before The Order Granting The Extension Was Entered.

When Mr. Castro filed his medical malpractice complaint on February 4, 2013, five days before the statute of limitations expired, he did not file the required affidavit of merit ("AOM"). The Complaint was instead accompanied by a motion to extend the time for filing the AOM pursuant to MCL 600.2912d(2) and a notice of hearing scheduling the motion for February 20, 2013. By the time the AOM was filed on February 25, 2013 (in advance of any order authorizing an extended filing), the motion to extend was heard on February 27, 2013, and the order granting the motion was entered on March 8, 2013, the statute of limitations had long since expired. Under these circumstances, the out-of-time order granting the extension did not retroactively toll or extend the statute of limitations or revive the previously-barred claim. Summary disposition *with prejudice* is required.

A. The Standard Of Review Is De Novo.

This Court reviews the grant or denial of a motion for summary disposition de novo. *Hill v Sears Roebuck & Co*, 492 Mich 651, 659; 822 NW2d 190 (2012); *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005). De novo review is also afforded to questions of statutory interpretation. *Mich Dep't of Transp v Tomkins*, 481 Mich 184, 190; 749 NW2d 716 (2008).

B. The Principles Of Statutory Construction Require That MCL 600.2912d(2) Be Applied As Plainly Written Without Reading Words Into Or Out Of The Statute.

There is no ambiguity in MCL 600.2912d(2). It is plainly written. It offers a 28-day extension of time to file the required affidavit of merit if good cause can be shown. Tolling does not occur upon filing. As the Court of Appeals explained in *Barlett v North Ottawa Community Hosp*, 244 Mich App 685, 691-692; 625 NW2d 470 (2001):

> The plain language of subsection 2912d(2) indicates that the granting of an additional twenty-eight-day period in which to file an affidavit of merit is not automatic. Rather, the trial court, by virtue of the permissive ("may") and conditional language ("good cause") has discretion to either grant or deny a plaintiff's motion.

MCL 600.2912d(2) does not retroactively toll the statute of limitations or retroactively revive a previously-barred claim when an order granting an extension is entered. The absence of language directing that result means that the extension order must be obtained while the claim is still viable. Any other meaning would require this Court to read words into and out of the statute, a cardinal prohibition in the world of statutory construction. It would also require this Court to disregard the effect of an expired statute of limitations.

This Court has frequently recited the rules of statutory construction, most recently in *Jesperson v Auto Club Ins Ass'n*, 499 Mich 29, 34; 878 NW2d 799 (2016), where this Court explained:

> When interpreting statutory language, we begin with the plain language of the statute. *Driver v Naini*, 490 Mich 239, 246-247; 802 NW2d 311 (2011). "We must give effect to the Legislature's intent, and the best indicator of the Legislature's intent is the words used." *Johnson v Pastoriza*, 491 Mich 417, 436; 818 NW2d 279 (2012). Additionally, when determining this intent we "must give effect to every word, phrase, and clause in a statute and avoid an interpretation that renders nugatory or surplusage any part of a statute." *Hannay v Dep't of Transp*, 497 Mich 45, 57; 860 NW2d 67 (2014) (quotation marks and citation omitted).

See also, *Byker v Mannes*, 465 Mich 637, 646-647; 641 NW2d 210 (2002) ("It is a well-established rule of statutory construction that this Court will not read words into a statute.").

The Legislature speaks only through its statutes. Legislative intent is to be derived from the language contained within the statute's "four corners." See e.g., *Halloran v Bhan*, 470 Mich 572, 576-577; 683 NW2d 129 (2004) (courts are to give effect to the legislative intent as expressed in the language of the statute). Courts are not free to venture beyond the statutory language in an attempt to divine legislative intent. "If the statutory language is clear and unambiguous, judicial construction is neither required nor permitted, and courts must apply the statute as written." *State Defender Union Employees v The Legal Aid & Defender Ass'n*, 230 Mich App 426, 431; 584 NW2d 359 (1998). In *In re Certified Question*, 468 Mich 109; 659 NW2d 597 (2003), this Court explained:

> A fundamental principle of statutory construction is that "a clear and unambiguous statute leaves no room for judicial construction or interpretation." *Coleman v Gurwin*, 443 Mich 59, 65; 503 NW2d 435 (1993) ... When a legislature has unambiguously conveyed its intent in a statute, the statute speaks for itself and there is no need for judicial construction; the proper role of a court is simply to apply the terms of the statute to the circumstances in a particular case. *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 27; 528 NW2d 681 (1995). [468 Mich at 113.]

See also, *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002) ("a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature *as derived from the words of the statute itself*.") (emphasis added). *Ligons v Crittenton Hosp*, 490 Mich 61, 70; 803 NW2d 271 (2011) ("Our goal when interpreting and applying statutes or court rules is to give effect to the plain meaning of the text. If the text is unambiguous, we apply the language as written without construction or interpretation.").

1. The Plain Language of MCL 600.2912d(2) Does Not Automatically Or Retroactively Toll Or Extend The Limitations Period Or Revive A Barred Claim.

The result reached by the *Castro* majority is not supported by the plain language of MCL 600.2912d(2). The statute does not automatically toll or extend the limitations period when a motion to extend is filed. Nor does it retroactively toll or extend the limitations period when an order granting an extension is entered. And, nothing in the statute can be read to retroactively revive a time-barred claim upon entry of an out-of-time extension order. The statute simply states:

> Upon motion of a party for good cause shown, the court in which the complaint is filed may grant the plaintiff or, if the plaintiff is represented by an attorney, the plaintiff's attorney an additional 28 days in which to file the affidavit required under subsection (1). [MCL 600.2912d.]

There are parallel statutes in states around the country that *do* automatically extend the statute of limitations to permit the later filing of an AOM. Those statutes do so expressly using language that is not found in the Michigan corollary. For example, an automatic 90-day extension is provided upon request in Connecticut when additional time is necessary to obtain the requisite medical malpractice "certificate of good faith."[2] Interestingly, that request is to be directed "to the clerk of the court" and does not require good cause. CGSA § 52-190a(b) provides:

---

[2] CGSA § 52-190a(a) provides in part that the complaint contain the certificate of the attorney or party filing the action that "reasonable inquiry gave rise to a good faith belief that grounds exist for an action against each named defendant" and further states:

> To show the existence of such good faith, the claimant or the claimant's attorney … shall obtain a written and signed opinion of a similar health care provider … that there appears to be evidence of medical negligence and includes a detailed basis for the formation of such opinion.

> Upon petition to the clerk of the court where the civil action will be filed to recover damages resulting from personal injury or wrongful death, ***an automatic ninety-day extension of the statute of limitations shall be granted*** to allow the reasonable inquiry required by subsection (a) of this section. This period shall be in addition to other tolling periods. [*Id*. (emphasis added).]

Automatic extensions are also authorized in West Virginia and New York. In West Virginia, the statute provides:

> If a claimant or his or her counsel has insufficient time to obtain a screening certificate of merit ***prior to the expiration of the applicable statute of limitations***, the claimant shall comply with the provisions of subsection (b) of this section except that the claimant or his or her counsel shall furnish the health care provider with a statement of intent to provide a screening certificate of merit within sixty days of the date the health care provider receives the notice of claim. [W Va Code § 55-7B-6(d) (emphasis added).]

In New York, if the attorney certifies with the complaint that he was unable to obtain the consultation required to conclude that there is a reasonable basis to commence the action "***because a limitation of time, established by article two of this chapter, would bar the action*** and that the certificate required by paragraph one of this subdivision could not reasonably be obtained ***before such time expired***," the certificate "shall be filed within ninety days after service of the complaint." McKinney's CPLR § 3012-a(2) (emphasis added).

The North Carolina provision is clearly directed to the statute of limitations but the extension must be obtained by pre-suit motion showing good cause and that "the ends of justice would be served by an extension." The statute states in part:

> Upon motion by the complainant ***prior to the expiration of the applicable statute of limitations***, a resident judge of the superior court for a judicial district in which venue for the cause of action is appropriate under G.S. 1-82 or, if no resident judge for that judicial district is physically present in that judicial district, otherwise available, or able or willing to consider the motion, then any presiding judge of the superior court for that judicial district ***may allow a motion to extend the statute of limitations for a period not to exceed 120 days to file a complaint in a medical malpractice action in order to comply with this Rule***, upon a determination that good cause exists for the granting of the motion and that the ends of justice would be served by an extension… [NC R Civ Proc, GS §1A-1, Rule 9(j) (emphasis added).]

In Delaware, the extension statute expressly provides for tolling of the limitations period pending the Court's decision on an extension motion. 18 Del C § 6853(a) states (with emphasis added):

> (2) The court, may, upon timely motion of the plaintiff and for good cause shown, grant a single 60-day extension for the time of filing the affidavit of merit. Good cause shall include, but not be limited to, the inability to obtain, despite reasonable efforts, relevant medical records for expert review.
>
> (3) A motion to extend the time for filing an affidavit of merit is timely only if it is filed on or before the filing date that the plaintiff seeks to extend. ***The filing of a motion to extend the time for filing an affidavit of merit tolls the time period within which the affidavit must be filed until the court rules on the motion***.

Unlike the sampling of statutes described above, MCL 600.2912d(2) does not contain language which extends or tolls the statute of limitations, or allows any extension "automatically" upon the filing of a motion. The *Castro* majority erroneously read words into the Michigan statute to achieve the relief expressly attainable in these other states. In so doing, the Court took the legislative reins into its own hands, exceeded the limitations of judicial power, and upset the balance created by Michigan's separation of powers doctrine.

2. The Legislature Knows How To Toll The Limitations Period When That Is Its Intent.

Courts have a duty "to give meaning to the Legislature's choice of one word over another" and "[t]his Court will not assume that the Legislature inadvertently made use of one word or phrase instead of another." *Jesperson*, 499 Mich at 435, citing *Robinson v Detroit*, 462 Mich 439, 459, 461; 613 NW2d 307 (2000) and *People v Williams*, 491 Mich 164, 175; 814 NW2d 270 (2012). The Legislature knows what language to use when tolling of the statute of limitations is the intended result of a particular act or order. In the same body of tort reform legislation that embodies the affidavit of merit requirement, the Legislature amended MCL 600.5856 to expressly toll the statute of limitations when a notice of intent to file a medical

malpractice complaint is given. The notice of intent requirement is set forth in MCL 600.2912b. MCL 600.5856 provides for tolling, stating in pertinent part:

> The statutes of limitations or repose are tolled in any of the following circumstances:
>
> * * * *
>
> (c) ***At the time*** notice is given in compliance with the applicable notice period under section 2912b, if during that period a claim would be barred by the statute of limitations or repose; but in this case, the statute is tolled not longer than the number of days equal to the number of days remaining in the applicable notice period after the date notice is given. [*Id.* (emphasis added).]

The notice-tolling provision is part of the same body of tort reform legislation that gave rise to the affidavit of merit requirement. Certainly, if the Legislature intended tolling to occur upon the filing of a motion to extend, or to occur retroactively upon the granting of a motion to extend, it would have explicitly so stated in this statute.[3]

The Legislature has created other tolling and extension statutes as well. MCL 600.5851 extends the limitations period for persons who are insane or under the age of eighteen until one year after the disability is removed. MCL 600.5853 tolls the limitations period when a claim accrues against a defendant who is out of state at the time of accrual. MCL 600.5838(b) provides that a medical malpractice plaintiff must file the claim within the applicable limitations period or within six months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later. Under MCL 600.5855, where a defendant has fraudulently concealed the existence of a claim or the identity of any person who is liable for the claim, the action may be commenced within two years after the plaintiff discovers or should have

[3] It is not clear how tolling could ever occur retroactively after a claim has already been barred by the statute of limitations. At that point, there would be nothing to toll. See e.g., *Ligons*, 490 Mich 90 ("[A]n AOM filed during a saving period ***after the limitations period has expired tolls nothing***, ***as the limitations period has run*** and the saving period may not be tolled." *Id.* (emphasis added).

discovered the claim or identity of the person liable for the claim "although the claim would otherwise be barred by the period of limitations."

These are all clear statutory expressions of the Legislature's intent. The absence of any similar language in MCL 600.2912d(2) means that a different result was intended. As this Court has expressed, "when the legislature has used certain language in one instance and different language in another, the indication is that different results were intended." *French v Mitchell*, 377 Mich 364, 384; 140 NW2d 426 (1966); see also *People v Valentin*, 220 Mich App 401, 415-416; 559 NW2d 396 (1996) ("The fact that the Legislature created an exemption in MCL 771.4; MSA 28.1134 and, in the same act, added a statute with markedly different language … strongly suggests that the presence of the words "of years" was intentional."). [4]

Here, if the Legislature wanted to decree that the filing of a motion to extend automatically tolls the statute of limitations while the motion is pending, it would have approached the issue in the same manner that it did when it declared that the statute of limitations is tolled during the notice of intent period. It knew how to do this but obviously chose not to. This Court cannot by interpretation read those missing words into the statute or give it a meaning that is not expressed. See e.g., *Chabad-Lubavitch of Mich v Schuchman*, 497 Mich 1021; 862 NW2d 648 (2015), where this Court declined to invoke tolling, stating that "[t]he statutory scheme is exclusive, and neither statute contains a provision to toll the period of limitations."

---

[4] See also, MCR 3.501(F), which expressly tolls the statute of limitations as to all putative class members, stating:

> The statute of limitations is tolled as to all persons within the class described in the complaint on the commencement of an action asserting a class action.

3. The Legislature Knows How To Revive A Barred Claim When That Is Its Intent.

Courts "cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute, and then, on the basis of that assumption, apply what is not there." *People v Gloster*, 499 Mich 199, 206; ___ NW2d ___ (2016) (citing *Furrington v Total Petroleum, Inc*, 442 Mich 201, 210; 501 NW2d 76 (1993)). In *Gloster*, the issue was whether under MCL 777.40 the sentencing court could assess against a defendant aider and abettor 15 points for predatory conduct committed by the defendant's co-offenders. Unlike other "offense variables", MCL 777.40 contained no language directing the court to assess a defendant the same number of "predatory conduct" points as his co-offenders. This Court concluded that it could not import such language into MCL 777.40 because to do so would violate the principles of statutory interpretation." *Gloster*, 499 Mich at 207.

Likewise, MCL 600.2912d(2) does not reflect an intent to permit an order granting an extension to retroactively revive a barred claim. If revival of the statute of limitations was the Legislature's intent, it would have used language expressly applying that mechanism, as it has done in other statutes. One such statute is MCL 600.5866, which states (with emphasis added):

> Express or implied contracts which have been barred by ***the running of the period of limitation shall be revived*** by the acknowledgment or promise of the party to be charged. But no acknowledgment or promise shall be recognized as effective to bar the running of the period of limitations or revive the claim unless the acknowledgment is made by or the promise is contained in some writing signed by the party to be charged by the action.

Another is the Paternity Act, MCL 722.714, which expressly states (with emphasis added):

> This subsection applies regardless of whether the cause of action accrued before June 1, 1986 and ***regardless of whether the cause of action was barred*** under this subsection before June 1, 1986.

Revival of a claim may also occur when the Legislature amends the statute of limitations for the claim and "an intent to have the statute operate retrospectively clearly and unequivocally appears

from the context of the statute itself." *Pryber v Marriott Corp*, 98 Mich App 50, 55; 296 NW2d 597 (1980).[5]

In this case, because the order granting the extension was not entered before the statute of limitations expired, it was ineffective to extend the time for filing the affidavit of merit. Nothing in the wording of the statute reflects an intent to revive a barred claim. In *Greer v Advantage Health*, 2016 Mich LEXIS 1392 (July 8, 2016), the statutory collateral source rule did not expressly reflect what may have been the Legislature's intent with respect to excluding from post-verdict offset only the amounts covered by a contractual lien exercised by the lien holder, but this Court was not willing to read that limitation into the statute, and in fact, could not. As Justice Markman explained in *Johnson v Recca*, 492 Mich 169, 187; 821 NW2d 520 (2002):

> "Whether or not a statute is productive of injustice, inconvenience, is unnecessary, or otherwise, are questions with which courts . . . have no concern." *Voorhies v Recorder's Court Judge*, 220 Mich 155, 157; 189 NW 1006 (1922) (quotation marks and citation omitted). "It is to be assumed that the legislature . . . had full knowledge of the provisions . . . and we have no right to enter the legislative field and, upon assumption of unintentional omission . . . , supply what we may think might well have been incorporated." *Reichert v Peoples State Bank*, 265 Mich 668, 672; 252 NW 484 (1934). Thus, despite the acknowledged possibility that the Legislature's failure to amend MCL 500.3135(3)(c) and the other provisions that employ the phrase "allowable expenses, work loss, and/or survivor's loss" to include replacement services may have been the result of an oversight, that is not self-evident to us, and the judiciary is powerless to address the problem. Simply stated, the judicial branch cannot amend the no-fault act to make it "better." That is an authority reserved solely to the Legislature. [*Id.* (emphasis added).]

---

[5] See also *Heck v McConnell*, 165 Mich App 52, 54; 418 NW2d 678 (1987), where the Court of Appeals recognized that "the clear language of the statute indicates that it is to be applied retrospectively, even to those claims previously barred by the prior limitations period," citing *Smith v Thompson*, 153 Mich App 441; 395 NW2d 700 (1986). No such language appears in MCL 600.2912d(2).

4. Automatic Tolling Renders Nugatory The "Granting" And "Good Cause" Requirements Of MCL 600.2912d(2).

"It is an elementary rule of construction that all words found in the act are presumed to be made use of for some purpose, and, so far as possible, effect must be given to every clause and sentence." *Bd of Regents of Univ of Mich v Auditor General*, 167 Mich 444, 450; 132 NW 1037 (1911). Further, "courts 'must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory.'" *Johnson*, 492 Mich at 177 (quoting *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146, 644 NW2d 715 (2002)). Here, if the mere filing of a motion to extend *automatically* tolls or extends by 28 days the time for filing an affidavit of merit, the "granting" of the motion by the Trial Court and the required "good cause" showing would be rendered nugatory. In other words, the automatic extension would preempt both the Trial Court's decision and the criteria by which it must be exercised rendering meaningless those portions of the statute. The statute cannot be given that effect. [6] "[M]edical malpractice suits are governed in detail by specific

[6] As explained in Defendants' Application at 19, the good cause requirement is also rendered nugatory by the manner in which it was applied by the *Castro* majority. The majority stated that this "term has, in such undefined circumstances, been found 'so general and elastic in its import that we cannot presume any legislative intent beyond opening the door for the court to exercise its best judgment and discretion in determining if conditions exist which excuse the delay …'" (quoting *Lapham v Oakland Circuit Judge*, 170 Mich 564, 570; 136 NW 594 (1912)). If the Legislature intended the grant of an extension to be limited by nothing more than the trial court's discretion, it would have included that language in the statute. Its incorporation of a good cause standard was obviously intended to invoke a greater burden. MCL 600.2912d is an integral component of Michigan's tort reform statutes. Over the past decades, this Court has worked vigilantly to effectuate the legislative intent against interpretative encroachments upon the statutory framework. Although this is not an issue the Court has designated for supplemental briefing, it remains worthy of the Court's consideration. *Castro's* dilution of the "good cause" standard opens the floodgates to dilatory filings. Further, because *Castro* is a published opinion, the meaning it ascribes to "good cause" could very well set the standard in other, unintended contexts with adverse consequences upon the jurisprudence of this state.

statutes unique to this area of law." *Ligons*, 490 Mich at 83. This Court is not at liberty to alter the legislative framework.

5. The Granting Of The Motion To Extend Could Not Have Tolled The Statute Of Limitations, Which Had Already Expired.

Given the above, in this case tolling could not have occurred upon the filing of Mr. Castro's motion to extend. The statute of limitations therefore continued to run and expired on February 9, 2013, nearly a month before the order granting the extension was entered. By that time, the claim was barred and there was nothing left of the statute of limitations for the order to toll. The answer to this Court's question is therefore "no" – the filing of a motion for an extension of time to file an affidavit of merit, which is subsequently granted, is ***not*** sufficient to toll the statute of limitations.

C. MCL 600.2912d(2), As Applied, Must Be Consistent With Long-Settled Principles Governing The Statute Of Limitations In Medical Malpractice Cases.

As explained above, MCL 600.2912d(2) does not exist in a vacuum. It must be harmonized with MCL 600.5805(6) and long-settled principles which govern the statute of limitations in medical malpractice cases.[7]

1. Under *Scarsella*, Filing A Complaint Without The Requisite Affidavit Of Merit Does Not Toll The Statute Of Limitations

Typically, the filing of a complaint will toll the statute of limitations. See MCL 600.5856(a). However, as explained above, if the complaint asserts a claim for medical malpractice, it must be accompanied by an affidavit of merit. See MCL 600.2912d(1). In

[7] MCL 600.5805 provides in pertinent part: "(1) A person shall not bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first accrued to the plaintiff or to someone through whom the plaintiff claims, the action is commenced within the periods of time prescribed by this section…. (6) Except as otherwise provided in this chapter, the period of limitations is 2 years for an action charging malpractice."

Scarsella v Pollak, 461 Mich 547, 549-50; 607 NW2d 711 (2000), this Court held that a failure to file an affidavit of merit with a complaint for medical malpractice renders the complaint a "nullity" and the fact of its filing does not toll the statute of limitations "because the complaint without an affidavit was insufficient to commence plaintiff's malpractice action." This interpretation is necessary, this Court explained, to effectuate "the Legislature's clear statement that an affidavit of merit 'shall' be filed with the complaint." *Id*. at 552. As a result, if an affidavit of merit is not filed *before the statute of limitations expires* the case must be dismissed with prejudice. *Id*. at 549.

This Court reaffirmed the *Scarsella* rule in *Ligons v Crittenton Hosp*, 490 Mich 61; 803 NW2d 271 (2011), where this Court was asked to decide whether the dismissal of a medical malpractice suit was required if a defective affidavit of merit was filed after expiration of the limitations period and the wrongful death savings period. In holding that dismissal with prejudice was required, this Court explained that "allowing amendment of the deficient AOM would directly conflict with the statutory scheme governing medical malpractice actions, the clear language of the court rules, and precedent of this Court." *Id*. at 65. This Court reiterated that *Scarsella* establishes that when a plaintiff omits to file the required AOM, the complaint is ineffective and "does not work a tolling of the applicable period of limitation." *Id.* at 73. Further, "[w]hen the untolled period of limitations expires before the plaintiff files a complaint accompanied by an AOM, the case must be dismissed with prejudice on statute-of-limitations grounds." *Id*. at 73.

This Court most recently reiterated this rule in *Tyra v Organ Procurement Agency of Mich*, 498 Mich 68; 869 NW2d 213 (2015), which involved two Court of Appeals opinions addressing the statute of limitations effect of prematurely-filed complaints. *Tyra v Organ*

Procurement Agency, 302 Mich App 208; 860 NW2d 667 (2013), and *Furr v McLeod*, 304 Mich App 677; 848 NW2d 465 (2014). See Defendants' Application at 11. In *Tyra*, this Court rejected the notion that MCL 600.1901, which states that a civil action is commenced by filing a complaint with the court, controlled the result, reiterating that a medical malpractice action is not properly commenced unless the notice and affidavit of merit requirements are satisfied ***before the statute of limitations expires***. This Court explained:

> Although a civil action is generally commenced by filing a complaint, a medical malpractice action can only be commenced by filing a timely NOI and then filing a complaint and an affidavit of merit after the applicable notice period has expired, ***but before the period of limitations has expired***. Because plaintiffs did not wait until the applicable notice period expired before they filed their complaints and affidavits of merit, they did not commence actions against defendants. Because the statute of limitations has since expired, plaintiffs' complaints must be dismissed with prejudice. [498 Mich at 94 (emphasis added).]

The published authority of the Michigan Court of Appeals has followed the rule laid down by this Court in *Scarsella*. See e.g., *Holmes v Mich Capital Med Ctr*, 242 Mich App 703, 709; 620 NW2d 319 (2000) ("Plaintiffs' claim was time-barred because plaintiffs' April 20, 1998, attempt to remedy their failure to file the affidavit of merit occurred beyond the limitation period.").

With respect to the very issue presently pending before this Court, *Scarsella* and its progeny formed the foundation for the Court of Appeals' rulings in *Barlett v North Ottawa Community Hosp* and *Young v Sellers*, which held that the filing of a motion to extend under MCL 600.2912d(2) does not automatically toll the statute of limitations and if the affidavit of merit is not filed before the statute of limitations expires, dismissal is required. In *Young*, the Court of Appeals concluded that "[a]lthough the Legislature provides an additional twenty-eight days to file an affidavit of merit for good cause, MCL 600.2912d(2), the mere filing of such a motion does not act to toll the period of limitation." 254 Mich App 447, 451; 657 NW2d 555

(2003). Likewise in *Barlett*, the Court rejected the assertion that dismissal was unwarranted because plaintiff filed a motion to extend "contemporaneously with the complaint, thereby tolling the period of limitation." 244 Mich App 685, 690; 625 NW2d 470 (2001). The Court explained that "[t]he plain language of subsection 2912d(2) indicates that the granting of an additional twenty-eight-day period in which to file an affidavit of merit *is not automatic*"; rather the "granting of a motion for additional time tolls the period of limitation." *Id.* at 691-692 (emphasis added). These cases are discussed in greater detail in Defendants' Application at 13.

In holding that Mr. Castro's claim was "perfected" because he filed a motion to extend with the complaint and filed the affidavit of merit within 28 days thereafter, the *Castro* majority disregarded the overwhelming body of settled law reflected in *Scarsella*, *Ligons, Tyra, Holmes, Barlett* and *Young*.[8] There is no way to reconcile the *Castro* result with the law announced in those cases. Stare decisis requires adherence to the principles they enunciate. As this Court explained in *Ligons*, "stare decisis is generally 'the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'" 490 Mich at 76 (quoting *Robinson*, 462 Mich at 463, quoting *Hohn v United States*, 524 US 236, 251; 118 S Ct 1969; 141 L Ed 2d 242 (1998)).

[8] Numerous other unpublished Court of Appeals opinions have relied upon *Barlett* and *Young* in reaching the same conclusion. See Defendants' Application at 15. Defendants cited these decisions to advise the Court that, until the decision in *Castro*, the rule of *Young* and *Barlett* had been consistently applied by numerous Court of Appeals' panels.

2. To Be Effective, An Order Granting A Motion To Extend Under MCL 600.2912d(2) Must Be Entered Before The Statute Of Limitations Expires.

Defendants do not advocate an interpretation that gives MCL 600.2912d(2) no meaning at all. But it is not enough to say that the claim is preserved as long as the motion is heard and the extension-order entered within the 28-day extension period. In fact, there is no extension period unless and until the Trial Court so holds. As dissenting Judge Wilder observed in *Castro*, MCL 600.2912d(2) and the statute of limitations in MCL 600.5805(6) must be read harmoniously. *Castro,* 312 Mich App 1, 11 (2015) (WILDER, J., dissenting). Under the authority of *Scarsella*, a medical malpractice claim barred by the statute of limitations cannot be retroactively revived. Therefore, the only application that might be consistent with the now-settled jurisprudence of this state is to require that the extension motion be heard, granted and the order entered *before the statute of limitations has expired*. Any other interpretation would have the effect of bringing a barred claim back from the dead, a concept that simply has no precedent (or legal mechanism) in the context of this case.

CONCLUSION AND RELIEF REQUESTED

In sum, without an affidavit of merit the February 4, 2013 filing of Mr. Castro's complaint (even though accompanied by a motion to extend) was a nullity and did not toll the statute of limitations. The statute of limitations accordingly expired on February 9, 2013. All subsequent events, including the February 25 service of the affidavit of merit, the February 27 hearing on the motion to extend, and the March 8 entry of the order extending the time to file the affidavit of merit, all which occurred after the claim was barred, were powerless to revive the expired claim. This is the only reading of MCL 600.2912d(2) that is permitted by the rules of statutory construction, by the law governing affidavits of merit, and by the longstanding statute of limitations doctrines. The Trial Court's grant of summary disposition should have been

affirmed. Reversal of the Court of Appeals' majority decision in *Castro* is respectfully requested.

Respectfully submitted,

KERR, RUSSELL AND WEBER, PLC

By: */s/ Joanne Geha Swanson*
Joanne Geha Swanson (P33594)
Attorneys for Defendants-Appellants
500 Woodward Avenue, Suite 2500
Detroit, MI 48226-3427
313-961-0200
313-961-0388 – facsimile
jswanson@kerr-russell.com

Dated: July 22, 2016

CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2016, I electronically filed the foregoing Supplemental Brief in Support of Application for Leave to Appeal with the Clerk of the Court using the ECF system and served a copy upon James D. Wines, Esq., 2254 Georgetown Boulevard, Ann Arbor, MI 48105-1537 by First Class Mail.

Dated: July 22, 2016

KERR, RUSSELL AND WEBER, PLC

By: */s/ Joanne Geha Swanson*
Joanne Geha Swanson (P33594)
500 Woodward Avenue, Suite 2500
Detroit, MI 48226-3427
Telephone: (313) 961-0200
Facsimile: (313) 961-0388
jswanson@kerr-russell.com

Attorneys for Defendants-Appellants